

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES BRITTINGHAM,

Plaintiff,

No. CIV S-04-0037 LKK DAD P

vs.

R. SANDHAM,

Defendant.

ORDER

On March 1, 2006, plaintiff filed a request to court deny defendant's pretrial motion for summary judgment. Defendant has not filed such a motion. As required by the court's order filed October 26, 2005, defendant has filed a status report in which he provides information concerning pretrial motions that he may file in this case.<sup>1</sup>

Plaintiff was advised in the court's November 17, 2005 order that it is the defendant's burden to litigate properly raised affirmative defenses. (Order filed Nov. 27, 2005, at 2 n.1.) A motion to dismiss for failure to exhaust administrative remedies may be made pursuant to the non-enumerated portion of Fed. R. Civ. P. 12(b) at any time but preferably as soon as

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<sup>1</sup> Defendant appears to have indicated in error that he may make a motion for failure to state a claim. A motion making the defense of failure to state a claim upon which relief can be granted is one of six defenses that "shall be made before pleading." Fed. R. Civ. P. 12(b).

1 possible so that the issue can be resolved before the parties engage in extensive litigation.  
2 Defendant may file a motion for summary judgment pursuant to Fed. R. Civ. P. 56(b) “at any  
3 time.” The court’s order filed December 27, 2004, provides plaintiff with detailed information  
4 about responding to such motions. (See Order filed Dec. 27, 2004, at 3-5.)

5 In his March 1, 2006 request, plaintiff complains that defendant “is still  
6 investigating and has not served me his findings.” Defendant has no obligation to serve findings  
7 on plaintiff. Plaintiff also requests that the court set a date for a settlement conference. Plaintiff  
8 cites the statement in defendant’s status report that he “would not oppose a settlement  
9 conference, if this matter goes on to trial.” It does not appear that defendant desires a settlement  
10 conference at this time. If this case is not resolved by dispositive motion, the court will consider  
11 setting a settlement conference if both parties request it in their pretrial statements to be filed in  
12 accordance with the scheduling order signed concurrently with this order. Plaintiff is informed,  
13 however, that he may initiate settlement negotiations at any time by sending defendant’s counsel  
14 a written settlement proposal. Correspondence between the parties regarding settlement shall not  
15 be submitted to the court for filing. If the parties reach a settlement, defendant’s counsel may  
16 prepare and file appropriate dispositional documents signed by both parties.

17 Plaintiff recently notified the court and defendant of an anticipated change of  
18 address effective May 7, 2006. Plaintiff asks for a continuance to assure that no “holds or court  
19 appearances” slow up his release. No continuance is necessary for this purpose, as no matters are  
20 set for hearing in court at this time or by the concurrently signed scheduling order. Plaintiff is  
21 directed to file and serve a document confirming his change of address after he is released.  
22 Plaintiff is cautioned that the mailbox rule applicable to documents filed by prisoners will not  
23 apply to his filings after he is released. Plaintiff’s documents must be placed in the mail to the  
24 court and to defendant’s counsel so that the documents are received on or before the deadline set  
25 by court order or applicable rule.

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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's March 1, 2006 request to deny defendant's pretrial motion is denied because no such motion has been filed.

2. Plaintiff's April 14, 2006 request for continuance is denied as unnecessary.

3. Plaintiff shall file a notice of confirmation of new address within twenty days after his release.

4. The caption of this order reflects that the sole remaining defendant in this action is R. Sandham, and the captions of documents filed by the parties in the future shall so reflect.

DATED: April 25, 2006.

  
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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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